BER Case 90-4

APPROVED BY BER
November 9, 1990

Section II.3.a. - Code of Ethics
Section II.5.a. - Code of Ethics

MISREPRESENTATION OF FIRM'S STAFF

FACTS:

Engineer X is employed by Firm Y, a medium-sized engineering consulting firm controlled by Engineer Z. Engineer X is one of a few engineers in Firm Y with expertise in hydrology, but the firm's work in the field of hydrology does not constitute a significant percentage of the firm's work. Engineer X, an associate with the firm, gives two weeks notice of her intent to move to another firm. Thereafter, Engineer Z, a principal in Firm Y, continues to distribute a brochure identifying Engineer X as an employee of the firm and list Engineer X on the firm resume.

QUESTION:

Was it ethical for Engineer Z to continue to represent Engineer X as an employee of Firm Y under the circumstances described?

REFERENCES:

Section II.3.a. -Engineers shall be objective and truthful in professional reports, statements or testimony. They shall include all relevant and pertinent information in such reports, statements or testimony.

Section II.5.a. -Engineers shall not falsify or permit misrepresentation of their, or their associates', academic or professional qualifications. They shall not misrepresent or exaggerate their degree of responsibility in or for the subject matter of prior assignments. Brochures or other presentations incident to the solicitation of employment shall not misrepresent pertinent facts concerning employers, employees, associates, joint venturers or past accomplishments with the intent and purpose of enhancing their qualifications and their work.

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DISCUSSION:

In recent years, the engineering profession much in the same manner as the legal and medical professions, has seen a virtual explosion of activities on the part of individual practitioners as well as firms to heighten their level of recognition in the eyes of prospective clients. Although some practitioners have attempted to resist the trend, it can be safely stated that a majority of engineering practitioners engage in some level of promotional activity in order to increase the visibility and activity of their firm. With the virtual elimination of legal as well as ethical proscriptions which for many years limited the ability of engineers and other professional groups to advertise, we have entered a "brave new world" where it often seems, "anything goes."

The Board has, in recent years, had occasion to consider a case similar to the instant case. In Case BER 83-1, Engineer A worked for Engineer B. Engineer B notified Engineer A that Engineer B was going to terminate Engineer A because of lack of work. Engineer A continued to work for Engineer B for several additional months after the termination notice. During that period, Engineer B distributed a previously printed brochure listing Engineer A as one of Engineer B's key employees, and continued to use the previously printed brochure with Engineer A's name in it well after Engineer B did in fact terminate Engineer A.

The Board ruled that it was not unethical for Engineer B to distribute a previously printed brochure listing Engineer A as a key employee providing Engineer B apprised the prospective client during negotiation of Engineer A's pending termination. The Board also ruled that it was unethical for Engineer B to distribute a brochure listing Engineer A as a key employee after Engineer A's actual termination. Interpreting the meaning of Section II.5.a, we noted that the words "pertinent facts" are those facts that have a clear and decisive relevance to a matter at hand. Another way to characterize pertinent facts is as those that are "relevant and highly significant." We determined whether (1) Engineer B in fact misrepresented "pertinent facts" and (2) whether it was the intent and purpose of Engineer B to "enhance the firm's qualifications and work." We noted that both factors must be present for a violation of Section II.5.a to exist. The Board noted that it is not unusual for an engineering firm that seeks to promote itself for business reasons to include in such a brochure a statement of the firm's experience, its history, its qualifications as well as the names and qualifications of the members of the firm. We said that the names of the firm's members are often quite significant to the client selecting the firm. The client may be familiar with an individual member of the firm as represented in the brochure. We concluded that the inclusion of the name of Engineer A in the firm's brochure constituted a misrepresentation of "pertinent facts."

In BER Case 83-1, a second point which we considered was whether it was the "intent and purpose" of Engineer B to "enhance the firm's qualifications and work" by including Engineer A's name in the promotional brochure after Engineer A left the firm. The facts presented in the case demonstrated that Engineer B acted with "intent and purpose" in distributing the misleading brochure. Engineer B was well aware of the impending termination of Engineer A as Engineer B was the very person who terminated Engineer A. Engineer B distributed the brochure while Engineer A was still employed but had been given a notice of termination. The Board noted that this could easily mislead potential clients into believing that Engineer A, noted as a key employee, would be available in the firm for consultation on future projects. Moreover, Engineer B distributed the brochure after Engineer A had left the firm. The Board concluded that this would be a clear misrepresentation of a pertinent fact with the intent to enhance the firm's qualifications and as such constituted a violation of the Code.

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Reviewing the facts involved in the present case, we are of the view that the facts while similar, are different in one important area. In the BER Case 83-1, Engineer A was highlighted in the firm's promotional brochure as a "key employee." Under the totality of the facts and circumstances of the case, it was apparent that Engineer B's continued inclusion of Engineer A's name in the brochure constituted an overt misrepresentation of an important fact concerning the overall make-up of the firm. We criticized Engineer B's action and we affirm that criticism. However, under the facts of the instant case, there is no suggestion that any of the brochures or other promotional material describe Engineer X as a "key employee" in the firm. Nor is there any effort or attempt on the part of Firm Y to highlight the activities or achievements of Engineer X in the field of hydrology. While the facts reveal that Engineer X is one of the few engineers in the firm with expertise in the field of hydrology, Engineer X is not the only engineer in the firm who possesses such expertise. In addition, it appears that this area of practice does not constitute a significant portion of the services provided by Firm Y; therefore it would seem to us that the inclusion of the name of Engineer X in the firms's brochure and resume would not constitute a misrepresentation of "pertinent facts."

In addition, unlike BER Case 83-1 we are reluctant to conclude that the actions of Firm Y and Engineer Z in including the name of Engineer X in the firm's brochure and resume demonstrate an intent to "enhance the firm's qualifications and work." In the present case, there does not appear to be the same motive on the part of the principal engineer or the firm to act in a manner which will materially benefit the firm as was so in BER Case 83-1. Here the action by Firm Y and Engineer Z appear more in the manner of an oversight without malice or intent. While this Board has found that unethical conduct in the past occurred in the absence of intentional actions, we do not consider the facts of this case to be of a nature to make such a finding.

Having said this, we must make clear that we are not condoning the failure of an engineering firm to correct material (brochures, resumes, etc.) which might have the unintentional effect of misleading clients, potential clients and others. While we recognize the realities of firm practice and the logistical problems involved in marketing and promotion, we do believe it is important for firms to take actions to expeditiously correct any false impressions which might exist.

In this regard we believe engineering firms that use printed material as part of their marketing efforts should take reasonable steps to assure that such written matter is as accurate and up-to-date as possible. In the case of marketing brochures and other similar materials, errata sheets, cover letters, strike-outs and, if necessary, reprints should be employed within a reasonable period of time in order to correct inaccuracies, particularly where a firm has reason to believe that a misunderstanding might occur. Firms that fail to take such measures run the risk of breaching ethical behavior.

CONCLUSION:

It was not unethical for Engineer Z to continue to represent Engineer X as an employee of Firm Y under the circumstances described.

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